IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 945

HARTFORD FIRE INSURANCE COMPANY,

Petitioner,

vs.

MARTIN LEITHAUSER, AS ADMINISTRATOR OF THE ESTATE OF P. J. LEITHAUSER, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Hartford Fire Insurance Company, respectfully represents and shows to the court:

SUMMARY STATEMENT OF THE CASE

This suit is to reform a policy of fire insurance and to recover a judgment upon the policy as reformed. It was filed in the Common Pleas Court of Defiance County, Ohio, on March 30, 1936 (R. 1), and thereafter duly removed

on the ground of diversity of citizenship, to the United States District Court, for the Northern District of Ohio, Western Division (R. 1).

Upon the trial in the District Court, the only issue considered upon its merits was that of reformation. A chattel mortgage defense set up in petitioner's answer was reserved for future determination (R. 177-79). On August 28, 1939, the district judge handed down a written opinion finding on the issue of reformation for defendant-petitioner and dismissing plaintiff-respondent's petition (R. 92; 29 F. Supp. 401).

The plaintiff-respondent, Leithauser, prosecuted an appeal from this adverse judgment, and the court below reversed the judgment of the District Court and, overlooking or disregarding entirely the fact that the issue of reformation alone had been submitted and tried in the District Court, remanded the case "with directions to decree reformation as indicated and **to render judgment upon the policy as reformed.**"[1] (R. 161.)

Upon the petition for rehearing filed by petitioner (R. 163), the court below altered the language of its opinion so as to remand the cause with directions to decree reformation and for "other proceedings" consistent with its opinion (R. 183).

The controlling facts in this case are not in dispute. These facts are concisely stated in chronological order in the Findings of Fact approved by the District Court (R. 92-95). We adopt these Findings of Fact, without material change, as our statement of the facts.

1. On January 28, 1930, the defendant-petitioner issued to plaintiff-respondent's decedent a policy of fire insurance for a period of one year upon a certain elevator

[1] All forms of emphasis in this petition and in the supporting brief which follows are supplied unless otherwise indicated.

owned by the decedent, located in Sherwood, Defiance County, Ohio (R. 11-23). This policy was a second renewal of a policy issued in January of 1928 (R. 128-133), and renewed in January, 1929 (R. 133-135).

2. At the dates on which these policies were issued, and at the date of the fire on July 20, 1930, the decedent, P. J. Leithauser, was a member of the partnership of Leithauser and Parent, engaged in Sherwood, Ohio, in the business of writing fire insurance. Said firm on the said dates was the duly licensed general agent of the defendant-petitioner for the purpose of writing fire insurance, and the policy in question and its predecessors were issued to the decedent by the said partnership of Leithauser and Parent as the general agent of the defendant-petitioner (R. 103, 114; 78 F. 2d 320).

3. On July 20, 1930, the insured elevator, with the exception of the office building, burned to the ground (R. 122).

4. On March 4, 1931, P. J. Leithauser, as plaintiff, filed his petition in the Common Pleas Court of Defiance County, Ohio, seeking **at law** a judgment on said policy in the sum of $10,000.00, which cause was duly removed to the United States District Court for the Northern District of Ohio, Western Division, and was docketed as Cause No. 3737 at Law.

5. In said law action the defendant-petitioner had pleaded, among others, the defenses that the property stood upon leased ground, and that there was existing at the time of the fire an undisclosed chattel mortgage on the insured property, contrary to policy conditions (R. 93; 78 F. 2d 320).

6. The cause came on for trial on or about June 28, 1933, before a jury, with Judge John M. Killits presiding. At the conclusion of the evidence, the court, without pass-

ing upon the chattel mortgage defense, sustained a motion of the defendant-petitioner for a directed verdict in its favor, on the ground that the property destroyed stood upon leased ground, in violation of a condition of the policy (R. 93, 78 F. 2d 320).

7. From the judgment entered upon this verdict Leithauser appealed to the United States Circuit Court of Appeals, for the Sixth Circuit, which affirmed the judgment of the trial court on June 29, 1935 (78 F. 2d 320; R. 140).

8. Leithauser then filed a motion in the Circuit Court of Appeals to recall the mandate and for leave to amend the petition, setting up a claim for reformation of the policy. This motion was denied by the court on October 8, 1935 (R. 141-142).

9. From the judgment of the United States Circuit Court of Appeals, affirming the judgment of the trial court and denying Leithauser's motion to recall the mandate and for leave to file an amended petition, Leithauser filed a petition for a writ of *certiorari* in the Supreme Court of the United States, which was denied on November 25, 1935 (296 U. S. 645).

10. Thereafter, on or about January 31, 1936, Leithauser in the same cause No. 3737 at Law in the District Court of the United States, for the Northern District of Ohio, Western Division, filed a motion for leave to file an amended petition, setting up a claim for the reformation of the policy. This motion was heard by and submitted to District Judge Paul Jones, who, on May 8, 1936, overruled and denied said motion (R. 94).

11. The present action, a new and separate *suit in equity* to reform the policy by inserting therein language to the effect that the property in question was on land leased by the insured from the Baltimore & Ohio Railroad Company, was filed on March 30, 1936, in the Common Pleas

Court of Defiance County, Ohio. This petition not only sought reformation of the contract, but judgment thereon after reformation in the sum of $10,000.00 and interest. This cause was duly removed by the defendant-petitioner to the District Court (R. 1-11).

12. The policy in question contains the following provision (R. 22):

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

13. The present suit was not brought until almost five years after the time specified in the policy within which suits could be brought. The fire occurred July 20, 1930 (R. 122). This suit was filed on March 30, 1936 (R. 1).

14. On March 22, 1937, P. J. Leithauser died, and this cause was revived upon motion of the administrator, and has since been prosecuted in the name of Martin Leithauser, as administrator of the estate of P. J. Leithauser (R. 122).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is found at page 154 of the record, and is reported in 124 F. 2d 117.

The opinion of the District Court may be found in the record at pages 85-92 and is officially reported in 29 F. Supp. 401.

The opinion of the United States Circuit Court of Appeals in the earlier case at law between the same parties is officially reported in 78 F. 2d 320.

Certiorari was denied by this court in the latter case (296 U. S. 645).

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed and reversed was entered on October 7, 1941 (R. 153), and the order denying the petition for a rehearing was entered on January 12, 1942 (R. 183).

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, c. 229, Section 1, 43 Stat. 938 (Title 28, U. S. Code, Section 347).

STATUTE INVOLVED

The case involves the meaning and application of Section 11233 of the Ohio General Code, which reads in part as follows:

> "**Saving in case of reversal, etc.**—In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date, * * *."

THE QUESTIONS PRESENTED

1. The insurance policy in question contains the following customary provision:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Under the settled law of Ohio, as announced by its highest court, the foregoing provision is held to be valid and enforceable, barring any suit not brought within the time specified. May the Circuit Court of Appeals, review-

ing a judgment of the District Court, sitting in Ohio where the cause of action arose, refuse to follow the law as established on this question by the Ohio Supreme Court?

2. Where the courts of Ohio, including its Supreme Court, have construed and applied a statute of the state (Sec. 11233 of the General Code), may the Circuit Court of Appeals in reviewing the judgment of the District Court, sitting in Ohio where the cause of action arose, ignore and refuse to follow the construction and application of such an Ohio statute as settled and established by the Ohio courts?

3. Where an action at law to recover on a policy of fire insurance has been fully tried **upon the merits** and determined adversely to the claims of the plaintiff, may the same claim between the same parties be relitigated in a suit in equity to reform the policy, as against a plea of *res adjudicata*, particularly where under the settled law of the State of Ohio all issues raised in the second suit **might** or **could** have been adjudicated in the first action?

4. Where a party has filed and prosecuted an action at law to recover on a policy of insurance to final judgment in the Federal District Court, which judgment has in all respects been affirmed by the Circuit Court of Appeals and *certiorari* denied by the Supreme Court of the United States, to the large expense and detriment of the other party,—may such party, as against a plea of estoppel by election of remedies, begin and prosecute a new action, more than five years after the fire, to reform such policy and recover on the policy as reformed?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

The decision of the Circuit Court of Appeals, reversing the judgment of the District Court in favor of petitioner, is directly and clearly in conflict with the decisions of the

Supreme Court of Ohio on matters of local law; and is, therefore, in conflict, likewise, with the doctrine announced by this court in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, and *West vs. A. T. & T. Co.*, 311 U. S. 223, and like decisions. In particular:

1. In holding that the present suit in equity to reform the policy of insurance and to recover on the same as reformed is not barred by the twelve months' limitation contained in the policy, the Circuit Court of Appeals has taken a position directly and irreconcilably in conflict with the decisions of the Supreme Court of Ohio in *Appel vs. Cooper Insurance Co.*, 76 O. S. 52; 80 N. E. 955, and in *Bartley vs. National Business Men's Association*, 109 O. S. 585; 143 N. E. 386, and has produced confusion in the Ohio law which had heretofore been clearly established by the Supreme Court of the State of Ohio.

2. In holding that **Section 11233 of the General Code** of Ohio saved and preserved, as against the limitation of twelve months contained in the policy, this action filed nearly six years after the fire, the Circuit Court of Appeals has adopted a construction of this statute directly contrary to its plain language, and in clear conflict with the construction and application given it by the Ohio decisions. Thereby, confusion has been introduced into the Ohio law with respect to a purely local, remedial statute.

(a) The first or prior action at law was tried and finally determined **on its merits in favor of the defendant** (not in favor of the plaintiff or otherwise than on its merits). Section 11233 of the General Code, therefore, could not apply or help out plaintiff-respondent as to the present action.

Siegfried vs. Railroad Co., 50 O. S. 294, 296; 34 N. E. 331.

Frost vs. Blatz, 23 O. App. 40; 155 N. E. 158.

25 O. Jur. 580, Section 235.

(b) The court below held that the present suit to reform the policy **is not the same cause of action** as the prior action to recover on the policy as written (R. 160). General Code, Section 11233, therefore, **cannot** apply, because it saves the second or subsequent suit **only** when it is based upon the **same cause of action** as that determined in a prior suit otherwise than upon its merits.

Larwill vs. Burke, 19 O. C. C. 449, 472; affirmed 66 O. S. 683; 65 N. E. 1130.

Piscopo, Admr. vs. Railway Co., 19 O. C. C. (N. S.) 298.

Price vs. Kobacker Furniture Co., 25 O. App. 44, 47; 158 N. E. 551.

Brown vs. Erie Railroad Co. (6th Cir.), 176 Fed. 544.

25 O. Jur. 580, Section 235.

(c) **Section 11233, General Code,** does not apply to a contractual limitation, like the one here involved, voluntarily entered into by the parties. It applies only to statutory limitations.

Prudential Insurance Co. vs. Howle, 19 O. C. C. 621; 10 Ohio Cir. Dec. 290.

Riddlesbarger vs. Hartford Insurance Co., 74 U. S. (Wall.) 386; 19 L. Ed. 259.

23 A. L. R. 98.

Contra, Cortesi vs. Firemen's Fund Insurance Co., 5 O. App. 109; 27 Ohio Cir. Dec. 100, decided by a divided court.

3. In refusing to affirm the decision of the District Court holding that respondent was barred of any recovery by the principle of *res adjudicata,* the Circuit Court of Appeals refused to follow the well settled law of Ohio to the effect that all issues which **might** or **could** have been ad-

judicated between the same parties in a former suit are *res adjudicata* in a subsequent suit based upon the same claim for relief. *Covington & Cincinnati Bridge Co. vs. Sargent*, 27 O. S. 233. *Strangward vs. Amer. Brass Bedstead Co.*, 82 O. S. 121; 91 N. E. 988. *Clark vs. Baranowski*, 111 O. S. 436, 440; 145 N. E. 760. *Bolles vs. Toledo Trust Co.*, 136 O. S. 517, 520; 27 N. E. 2d 145.

In this respect the decision of the Circuit Court of Appeals is likewise in conflict with the decisions of this court in *Baltimore Steamship Co. vs. Phillips*, 274 U. S. 316; 71 L. Ed. 1069, and in *Chicot County Drainage District vs. Baxter State Bank*, 308 U. S. 371; 84 L. Ed. 277.

4. The decision of the Circuit Court of Appeals, in holding that respondent was not estopped from a recovery as prayed for in the present suit by his election of remedies in prosecuting, to the prejudice of the petitioner, his former action at law to final adverse judgment in the District Court, the Circuit Court of Appeals for the Sixth Circuit, and to the Supreme Court of the United States on *certiorari*, is in conflict with decisions of this court, including *Warner vs. Godfrey*, 186 U. S. 365; 46 L. Ed. 1203, and the general law relating to estoppel by election of remedies. See also the following:

Healey Ice Mach. Co. vs. Green, 184 Fed. 515, 520.

Steinbach vs. Relief Fire Insurance Co., 12 Hun. (N. Y.) 640; affirmed 77 N. Y. 498.

Leaksville Light & Power Co. vs. Georgia Casualty Co., 193 N. C. 618; 137 S. E. 817, 818.

Thomas vs. United Firemen's Insurance Co., 108 Ill. App. 278, 281.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this Honorable Court, di-

rected to the United States Circuit Court of Appeals, for the Sixth Circuit, commanding that court to certify and to send to this court for review a full and complete transcript of the record and of the proceedings in Case No. 8640, entitled on its docket "*Martin Leithauser, as Administrator of the Estate of P. J. Leithauser, deceased, Appellant vs. Hartford Fire Insurance Company, Appellee,*" and that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF THE CASE

Reference is made to the foregoing petition for Summary Statement of the Case, citation to Opinions Below, and statement as to Jurisdiction.

II

SPECIFICATIONS AND ASSIGNMENTS OF ERROR

1. The court below erred in reversing and in not affirming the judgment of the District Court dismissing respondent's petition.

2. The court below erred in holding that the claim of the respondent is not barred by the limitation of time for bringing suits contained in the policy.

3. The court below erred in holding that Section 11233

of the Ohio General Code was applicable and saved respondent's right to prosecute the present suit.

4. The court below erred in holding that the present suit is not barred by the adjudication upon the merits in the former case at law.

5. The court below erred in holding that the present suit is not barred by estoppel and election of remedies.

6. The court below erred in refusing to follow and apply applicable decisions of the Supreme Court of Ohio and of this court to all of the foregoing questions.

III

SUMMARY OF ARGUMENT

1. The decision of the court below is in conflict with decisions of the Ohio Supreme Court as to the effect of the time limitation for bringing suits contained in the policy.

2. The application of Section 11233 of the Ohio General Code made by the court below is in conflict with the Ohio decisions.

(a) Under the Ohio decisions this statute applies only where the first or prior action is dismissed otherwise than upon its merits, or where a judgment in favor of the plaintiff has been reversed.

(b) Under the Ohio decisions this statute does not apply except where the second suit is upon the same cause of action as that disposed of otherwise than upon the merits in the former suit.

(c) Under one Ohio decision, a decision of this court, and the clear weight of authority, this statute and statutes of like character apply only to statutory limitations and not to contractual limitations.

3. The decision of the court below is in conflict with the Ohio decisions which hold that the prior suit deter-

mined upon its merits is res adjudicata of the issues presented in the present suit.

4. Respondent is barred from recovery in the present suit by his election of remedies.

5. The judgment and opinion of the District Court are sound and correct and are in accord with the Ohio authorities, and the decisions of this court.

IV.

ARGUMENT

1.

The Decision of the Court Below is in Conflict with Decisions of the Ohio Supreme Court as to the Effect of the Time Limitation for Bringing Suits Contained in the Policy.

The policy in question contains the following provision (R. 22):

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The fire occurred July 20, 1930 (R. 122). This suit was filed on March 30, 1936 (R. 1), nearly six years after the fire.

In Ohio the law is clearly settled by the highest court of the state that a limitation of time for bringing suit under a policy of insurance, of the type above quoted, is valid and enforceable, and bars recovery in any case not brought within the time specified.

The Supreme Court of Ohio in the case of *Appel vs. Insurance Co.*, 76 O. S. 52; 80 N. E. 955, decided this pre-

cise question and held in the syllabus (which states the law of Ohio) as follows:

> 1. "The parties to a contract of insurance may, by a provision inserted in the policy, lawfully limit the time within which suit may be brought thereon, provided the period of limitation fixed be not unreasonable.
>
> 2. "A provision in a policy of fire insurance that, 'no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within six months next after the fire,' is unambiguous, and in a suit on the policy commenced more than six months after the date of the fire, will be enforced in accordance with the plain meaning of its terms, where no extrinsic facts are alleged excusing delay in bringing the suit.
>
> 3. "Where a policy of fire insurance contains the provision that no suit or action shall be sustained thereon unless commenced within six months next after the fire, the period of limitation begins to run from the date of the fire, notwithstanding the policy also contains the provision 'that the loss shall not be payable until sixty days after proofs of loss have been received by the company'."

This case was expressly approved and followed in the later case of *Bartley vs. National Business Men's Association*, 109 O. S. 585; 143 N. E. 386. The Ohio Supreme Court has applied the same rule to a limitation contained in a bill of lading in *Pennsylvania Co. vs. Shearer*, 75 O. S. 249; 79 N. E. 431.

Respondent has not sought to reform this provision of the policy, nor does he claim that there has been any waiver of it by the company.

The rule as established in Ohio has been quite generally followed by the courts, including this court, which, in the leading case of *Riddlesbarger vs. Hartford Fire Insurance*

Co., 74 U. S. (Wall.) 386; 19 L. Ed. 259, speaking of such a limitation in a policy of insurance, said at page 392 of the opinion:

"We have no doubt of its validity."

See also *5 Joyce on Insurance*, 2nd Edition, Section 3181, and *7 Cooley Briefs on Insurance*, 2nd Edition, page 6781.

2.

The Application of Section 11233 of the Ohio General Code Made by the Court Below is in Conflict with the Ohio Decisions.

(a) Under the Ohio Decisions This Statute Applies Only Where the First or Prior Action is Dismissed Otherwise Than Upon Its Merits, or Where a Judgment in Favor of the Plaintiff Has Been Reversed.

The court below thought the present suit, although filed nearly six years after the fire, was saved as against the policy limitation by **Section 11233 of the Ohio General Code,** which in part provides as follows:

> "**Saving in case of reversal, etc.**—In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or if he dies and the cause of action survives, his representatives may commence a new action within one year after such date, * * *."

Under the Ohio decisions this section of the code would not apply nor save respondent's right to bring the present action. The language of the statute is plain. It applies in two instances only, to-wit:

(1) Where a judgment for the plaintiff has been reversed.

(2) Where the plaintiff fails otherwise than upon the merits.

Respondent does not fall within either of these classes. Respondent has never obtained a judgment and, therefore, a judgment in his favor has never been reversed.

In the first case, the law case, there was a judgment upon the merits in favor of petitioner. That judgment was affirmed by the court below (78 F. 2d 320), and *certiorari* was denied by this court (296 U. S. 645).

Nor does the respondent fall within the second class, since the prior case at law was determined, after a full trial, upon its merits, adversely to the respondent. In its opinion the court below (R. 160) made this statement:

> "In the first case Leithauser did not fail upon the merits within the meaning of Section 11233. The merits are embodied in the policy as reformed, but not in the policy as it was originally written."

This statement seems to underlie and be the very basis of the court's decision and shows how the court fell into error in applying Section 11233.

The first case brought to recover on the policy as written and fully tried and determined upon its merits, is not the same case as the present suit. The first case was entirely ended when this court denied respondent's petition for a writ of *certiorari*. The present suit is an entirely new, separate and distinct case from the first, and in it respondent sought reformation of the policy.

The merits of the prior case were embodied in the contract as written. The merits of the present suit involve the issue of reformation.

The error of the court below is in failing to see that in determining whether Section 11233 is applicable, and

whether it saves the present suit, the courts will **look only to the merits of the first or prior suit.** The merits of the present suit have nothing whatever to do with the question.

If, in the prior suit, respondent failed otherwise than upon the merits, then Section 11233 will save his rights here. On the other hand, if in the prior suit the issues were determined upon the merits adversely to respondent, then he is not helped out by this section of the Code.

The court below refused to follow the Ohio law which is clearly settled on this point.

> Siegfried vs. Railroad Co., 50 O. S. 294, 296; 34 N. E. 331.
>
> Frost vs. Blatz, 23 O. App. 40; 155 N. E. 158.
>
> 25 O. Jur. 580, Section 235.

See also the cases cited in the petition for rehearing in the court below (R. 172).

The leading case in Ohio is *Siegfried vs. Railroad Co. supra.* At page 296 of the opinion the court said:

> "The precise question in the case is, therefore, did the plaintiff **fail in his first action,** within the purview of the section of the statute above quoted. If he did not, the action below was barred; but if he did, it was not barred, for it was commenced the next day after the dismissal of the first action. We think the plaintiff, by the voluntary dismissal of his action, did not so fail; and his second action, the action below, was therefore barred."

In the case of *Frost vs. Blatz, supra,* at page 42, the court said:

> "It is sought, however, to prevent the bar of the statute by furnishing the court data showing that a prior action had been brought in July, 1922, which was dismissed on September 12, 1923. The court is not entitled to consider this information, but, even if considered, it does not show that the **prior action**

failed otherwise than on the merits, and that action would not, therefore, prolong the time for bringing the present suit."

In *25 O. Jur. 580, Section 235*, the law is stated as follows:

"However, the new action to be commenced within one year must be the **same** as the first action, and it must be shown that **prior action** failed otherwise than on its merits."

The test of whether **Section 11233** applies is whether the plaintiff failed upon the merits in the **first action.** Contrary to what the court below said, the merits of the second action have nothing whatever to do with it. The first action having failed upon its merits, **Section 11233** does not and cannot be applied so as to save respondent's rights in the present suit.

(b) Under the Ohio Decisions This Statute Does Not Apply Except Where the Second Suit is Upon the Same Cause of Action as That Disposed of Otherwise Than Upon the Merits in the Former Suit.

For a still further reason **Section 11233 of the Ohio General Code** is inapplicable. Under the Ohio decisions this code section applies only when the cause of action set forth in the second suit is the **same** as that determined otherwise than upon its merits in the first suit.

Is the present suit to reform the policy the **same cause of action** as that set forth in the first suit to recover upon the contract as written? If it is, the court below is in error because respondent's claim would clearly be barred by the adjudication in the former suit. The question of *res adjudicata,* however, will be hereinafter discussed.

To escape the rule of *res adjudicata,* the court below had to find, if it was to reverse the judgment of the District

Court, that the causes of action were not the same, and that was what the court did, as shown by the following quotation from the court's opinion (R. 160):

> "The judgment in the first Leithauser suit was not conclusive of the second. While the parties were the same in each case, **the causes of action were not.**"

In thus escaping from the rule of *res adjudicata,* the court below impaled itself upon the other horn of the dilemma, for under the Ohio decisions, as we have said, **Section 11233 of the General Code** will not apply unless the causes of action in the two cases are the same.

Larwill vs. Burke, 19 O. C. C. 449; affirmed 66 O. S. 683; 65 N. E. 1130.

Price vs. Kobacker Furniture Co., 25 O. App. 44; 158 N. E. 551.

Piscopo, Admr., vs. Railway Co., 19 O. C. C. (N. S.) 298.

25 O. Jur. 580, Section 235.

See also the Ohio authorities cited in the petition for rehearing filed in the court below (R. 167).

In the case of *Larwill vs. Burke, supra,* at page 472 of the opinion, the court said:

> "Under Section 4991 (now G. C. 11233), the new action to be commenced within one year after the party has failed in his first action otherwise than upon the merits, **must be the same as the first action.**"

In *Price vs. Kobacker Furniture Co., supra,* at page 47 of the opinion the court said:

> "The plaintiff had the right to commence a new action upon the **cause of action set out in the counterclaim** within one year from the date of the failure otherwise than upon the merits, provided the time limited for the commencement of an action had expired at the date of such failure."

In the case of *Piscopo, Admr. vs. Railway Co., supra,* the first paragraph of the syllabus states the law as follows:

> "1. Under Section 11233, General Code, if a plaintiff in an action for wrongful death fails otherwise than upon the merits, he may commence another action upon the **same cause** of action within one year thereafter."

A succinct statement of the Ohio law is contained in *25 O. Jur. 580,* Section 235, as follows:

> "However, the new action to be commenced within one year must be the **same** as the first action, and it must be shown that **prior action** failed otherwise than on its merits."

This court in the leading case of *Riddlesbarger vs. Hartford Fire Insurance Co.,* 74 U. S. (Wall.) 386; 19 L. Ed. 259, speaking of such a contractual limitation, at page 391 of the opinion said:

> "The action mentioned, which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained, unless such action, **not some previous action,** shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the court cannot insert one without changing the contract."

Strangely enough the court below in *Brown vs. Erie Railroad Co.,* 176 Fed. 544, considered this same subject and held that the test of whether **Section 11233 of the General Code** was applicable depended upon whether the cause of action in the second suit was identical with that in the first. We quote the first paragraph of the syllabus as follows:

> "Under a statute of limitations, which permits the beginning of a new suit within a certain time after

> the failure of a former suit brought in due time on the **same cause of action** otherwise than on the merits, a second suit by an employe against a railroad company for a personal injury is for the **same cause of action** as a prior suit where the parties and the injury are the same, the facts pleaded are the same, and the negligence charged against the company is the same in legal effect, although it may be attributed to a different agent."

At page 547 of the opinion, written by Judge Severens, the court said:

> "The question we have before us is whether the petition in this suit presents the **same cause of action** as was presented in the former suit. Inasmuch as the same question is involved in cases where an amendment to a petition is made after the statute has barred an action, and in cases where a new action is brought under a statute allowing it, namely, whether there is an identity in the cause of action brought in by the amendment, or stated in the new action, decisions in either class of cases upon that subject are equally pertinent to the case before us."

Upon the same page the court also said:

> "The identity of the cause of action in the original petition with that of the amended petition was the test of the question whether the case could be proceeded with upon the amended petition against a plea in bar of the statute."

The court was correct in stating that the test here is the same as that applicable to a situation where a party seeks to amend his petition by adding a new or different cause of action from that set forth in the original pleading, and the authorities in Ohio are clear that such amendment, if not filed within the statutory limitation, is barred.

> Second National Bank of Cincinnati vs. American Bonding Co. of Baltimore, 93 O. S. 362, 371, 372; 113 N. E. 221.

Hills vs. Ludwig, 46 O. S. 373; 24 N. E. 596.
Commissioners of Delaware County vs. Andrews, 18 O. S. 50, 68-69.

The court below having determined and held that the present suit is not the same cause of action as that set forth in the former suit at law, determined upon its merits, it follows that **Section 11233** cannot apply, and the present suit is barred.

(c) Under One Ohio Decision, a Decision of This Court, and the Clear Weight of Authority, This Statute and Statutes of Like Character Apply Only to Statutory Limitations and Not to Contractual Limitations.

Does Section 11233 of the Ohio General Code apply to contractual limitations voluntarily entered into by the parties, or is it limited in its application to statutory periods of limitation?

In Ohio there are two decisions upon this question, both by intermediate appellate courts, and they reach opposite results.

In the earlier case of *Prudential Insurance Co. vs. Howle*, 19 O. C. C. 621; 10 Ohio Cir. Dec. 290, the Court of Appeals of Cuyahoga County expressly held that **Section 11233 of the General Code** (formerly Section 4991, R. S.) has no application to limitations created by contract. We quote the syllabus of the case:

> "A provision in a life insurance policy that no suit shall be maintained thereon unless such suit shall be commenced within six months next after the decease of the assured, is valid.
>
> "Sec. 4991, R. S. (General Code 11233) has no application to limitations created by contract, and hence has no application to this case."

In *Cortesi vs. Firemen's Fund Insurance Co.*, 5 O. App. 109; 27 Ohio Cir. Dec. 100, the Court of Appeals for Mahoning County, Judge Pollock vigorously dissenting, held as shown by the syllabus as follows:

> "A clause which shortens the statute of limitations, as to the time for bringing suit on the contract in which said contract is incorporated, can not be enforced in the face of the provision of Section 11233, having reference to the time within which suit may be brought in cases **which have failed otherwise than on the merits.**"

A motion to certify was denied by the Supreme Court, but this denial is not any indication that the Supreme Court approved the holding of the lower court. *Village of Brewster vs. Hill*, 128 O. S. 343, 352-53; 190 N. E. 766. See also *West vs. A. T. & T. Co.*, (6th Cir.) 108 F. 2d 347, 350; rev. on other grounds 311 U. S. 223.

In the case of *Village of Brewster et al. vs. Hill, supra*, on pages 352 and 353 of 128 O. S., the Supreme Court of Ohio said:

> "We have heretofore announced that, in cases knocking at our door for certification, the refusal of a motion to certify, even if the same legal question is decisively involved, does not furnish an adjudication of the question by this court as an established precedent for future cases."

In the case of *West et al. vs. American Telephone & Telegraph Co.*, 108 Fed. (2d) 347, the court below, speaking through Judge Allen, an Ohio lawyer, on page 350, said:

> "A motion to certify was made in the Supreme Court of Ohio, and overruled. This may well have been because that court did not deem the case to be of great general and public interest. Ohio Constitution, Art. IV, Sec. 2. The settled rule in Ohio is that the Supreme Court, by denial of motion to certify the record, lays down no law. It not infrequently

> makes pronouncements counter to those of Circuit Courts of Appeals whose judgments it has refused to certify, on the same questions covered by those judgments. *Village of Brewster vs. Hill,* 128 Ohio St. 343, 353; 190 N. E. 766."

There has been no decision by the Ohio Supreme Court upon this question, but the clear weight of authority in other jurisdictions is in accord with the rule of the *Howle* case, rather than the *Cortesi* case.

This is shown by the collection of cases in the annotation in *23 A. L. R.* at page 98, where the annotator says:

> "In all but a few jurisdictions the rule is that the provisions of a general statute of limitations extending the time of the running thereof, or fixing the time when an action shall be deemed to be commenced, do not apply to a limitation period prescribed in a policy of insurance."

The rule in the *Howle* case is also the same as that announced by this court in the leading case of *Riddlesbarger vs. Hartford Fire Insurance Co.,* 74 U. S. (Wall.) 386; 19 L. Ed. 259. At page 391 of the opinion this court said:

> "The statute of Missouri, which allows a party who 'suffers a nonsuit' in an action to bring a new action for the same cause within one year afterwards, does not affect the rights of the parties in this case. In the first place, the statute only applies to cases of involuntary nonsuit, not to cases where the plaintiff of his own motion dismisses the action. It was only intended to cover cases of accidental miscarriage, as from defect in the proofs, or in the parties or pleadings, and like particulars. **In the second place, the rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also.**"

The court below considered the *Cortesi* case, *supra,* at length (R. 159) and seemed to base its decision largely

upon that case. Aside from the fact, however, that the decision was by a divided court and in conflict with the earlier *Howle* case, the *Cortesi* case deals only with the question as to whether Section 11233 is applicable to contractual limitations, as well as to statutory limitations.

It is not an authority for anything else and the facts are utterly different from the facts in the case at bar.

In the *Cortesi* case, the prior suit, instead of having been determined upon its merits, was **dismissed for want of prosecution** (page 110 of the opinion reported in 5 O. App.).

A dismissal for want of prosecution under the Ohio law is not a dismissal upon the merits. It is a dismissal otherwise than upon the merits **(G. C. Section 11586).**

Even if we concede for purposes of argument only, that the *Cortesi* case is a controlling Ohio decision on the subject of whether Section 11233 applies equally and alike to contractual limitations voluntarily entered into by the parties and limitations fixed by statute, yet the case is not pertinent nor of any authoritative value on the points hereinabove covered under Divisions (a) and (b).

Apparently the court below entirely overlooked this distinction and gave to the *Cortesi* case an emphasis which it does not deserve.

For the foregoing reasons, it is respectfully submitted that the court below was in error and did not follow the settled law of Ohio, in holding that Section 11233 of the General Code had application and saved respondent's rights as against the limitation of time for bringing suits contained in the policy.

3.

The Decision of the Court Below is in Conflict with the Ohio Decisions Which Hold That the Prior Suit Determined Upon Its Merits is Res Adjudicata of the Issues Presented in the Present Suit.

When respondent's decedent filed the first suit to recover on this policy, he elected to base his claim on one cause of action, namely, to recover upon the contract as written. He did not also include a second cause of action for reformation, as he would have had a perfect right to do under the Ohio law. **General Code Section 11306.** *Globe Insurance Co. vs. Boyle,* 21 O. S. 119.

Under the Ohio law it was the duty of the respondent's decedent to plead in that first petition all the grounds of recovery available to him. The Ohio courts do not encourage the splitting up of a claim for relief, and they hold that a party is bound not only by what was pleaded and determined in a given case, but also he is bound as to every claim which might or could have been pleaded and determined in that case.

Covington & Cincinnati Bridge Co. vs. Sargent, 27 O. S. 233.

Strangward vs. American Brass Bedstead Co., 82 O. S. 121; 91 N. E. 988.

Clark vs. Baranowski, 111 O. S. 436, 440; 145 N. E. 760.

Bolles vs. Toledo Trust Co., 136 O. S. 517, 520; 27 N. E. 2d 145.

Paragraph 1 of the syllabus in the case of *Covington & Cincinnati Bridge Co. vs. Sargent, supra,* reads as follows:

> "In a judicial proceeding in a court of record, where a party is called upon to make good his cause

> of action or establish his defense, he must do so by all the proper means within his control, and if he fails in that respect, purposely or negligently, he will not afterward be permitted to deny the correctness of the determination, nor to relitigate the same matters between the same parties."

In *Clark vs. Baranowski, supra,* the court at page 440 said:

> "In cases where there is identity of parties and subject-matter, it is the settled law of this state that a former judgment is conclusive between the parties, not only as to matters actually determined but also as to any other matters which could, under the rules of practice and procedure, have been determined."

This court in *Baltimore Steamship Co. vs. Phillips,* 274 U. S. 316; 71 L. Ed. 1069, has held to the same effect (opinion, page 320):

> "The same general doctrine is stated in *Stark vs. Starr,* 94 U. S. 477, 485, that 'a party seeking to enforce a claim, legal or equitable, must present to the court either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.' And see also *Werlein vs. New Orleans,* 177 U. S. 390, 398-400."

Applying the principles announced in these controlling cases, it is apparent that respondent is barred from recovering in the present case by the adjudication in the former case. The defense of *res adjudicata* was pleaded in petitioner's answer, and the pleadings, evidence and judgment in the former case were received in evidence and were before the court below (R. 125).

The parties and subject-matter are identical and respondent is bound by the adjudication in the former case to the same extent as if he had actually pleaded in the former suit a claim for reformation. That is true because under the rules of practice and procedure in Ohio such a cause of action could have been pleaded and determined in the former action.

The District Court in its opinion held that the respondent was estopped to maintain the present suit by the principle of former adjudication (R. 90). The District Court said:

> "The procedure in Ohio in 1931 when the first petition was filed permitted the plaintiff to insert a cause of action seeking reformation of the contract. This he failed to do." (R. 90.)

4.

Respondent is Barred from Recovery in the Present Suit by His Election of Remedies.

At the time respondent filed his petition in the first case and at the time the action was removed to the federal court, the law was clearly settled that a recovery could not be had in an action at law upon the policy as written, and that the remedy, if any, was by a suit in equity to reform the policy. The law to this effect had long been established by the decisions of this court and of the Circuit Court of Appeals for the Sixth Circuit. Some of the cases are as follows:

Northern Assurance Co. vs. Grandview Bldg. Assn., 183 U. S. 308; 46 L. Ed. 212.

Lumber Underwriters of New York vs. Rife, 237 U. S. 605; 59 L. Ed. 1140.

Sun Insurance Office vs. Scott, 284 U. S. 177; 75 L. Ed. 55.

Hartford Fire Insurance Co. vs. Nance, 6th Cir., 12 F. 2d 575.

Hartford Fire Insurance Co. vs. Jones, 6th Cir., 15 F. 2d 1.

Forkner vs. Twin City Fire Ins. Co., 6th Cir., 19 F. 2d 419.

It must be presumed that respondent knew the law established by these cases. They warned him that if he had any remedy it was in equity, and that he was barred from any relief in an action at law.

Notwithstanding this knowledge, respondent prosecuted with great pertinacity his action at law. The District judge, after a full trial, held against him and even warned him that if he had any remedy it was in equity (R. 5). Respondent, however, prosecuted error to the Circuit Court of Appeals where the judgment of the District Court was in all respects affirmed (78 F. 2d 320).

Respondent then filed a motion in the court below to recall the mandate and for leave to amend his petition so as to include a claim for reformation (R. 141), which motion was denied (R. 142). Respondent then filed a petition for *certiorari* in this court which was denied (296 U. S. 645).

Finally, respondent filed in the District Court in the same cause, a motion for leave to file an amended petition, setting up a claim for the reformation of the policy, which motion was denied (R. 94; Finding No. 10).

All of these proceedings covered a period of several years, and although doomed to failure from the very outset, they were, nevertheless, prosecuted vigorously by respondent and to the very large expense of the petitioner.

Respondent did not misconceive his remedy; he ignored his remedy and elected to gamble his own theory of the law

against the well established pronouncements to the contrary by the courts.

The elements of a valid estoppel are present: knowledge on the part of the respondent, actual or imputed, that an action at law afforded him no remedy; knowledge that his stubborn prosecution of the litigation through the courts was causing petitioner huge expense and detriment, and a persistent continuance of the action at law until more than five years after the occurrence of the fire.

Certainly there must be an end to litigation. Respondent is estopped by his election of remedies.

Warner vs. Godfrey, 186 U. S. 365; 46 L. Ed. 1203.

Healey Ice Machinery Co. vs. Green, 184 Fed. 515, 520.

Thomas vs. United Firemen's Ins. Co., 108 Ill. App. 278.

Leaksville Light & Power Co. vs. Georgia Casualty Co., 193 N. C. 618; 137 S. E. 817.

Royal Insurance Co. vs. Stewart, 190 Ind. 444; 129 N. E. 853.

Barnett Bros. vs. Western Insurance Co., 143 Ark. 358; 220 S. W. 465.

Steinbach vs. Relief Fire Insurance Co., 12 Hun. (N. Y.) 640; affirmed 77 N. Y. 498.

In the case of *Warner vs. Godfrey, supra*, the court at page 378 of the opinion said:

> "It would be highly inequitable to permit a litigant to press with the greatest pertinacity for years unfounded demands for specific and general relief, however much confidence he may have had in such charges, necessitating large expenditures by the defendants to make a proper defense thereto, and then, after the submission of the cause, when the grounds of relief actually asserted were found to be wholly

> without merit, to allow averments to be made by way of amendment, constituting a new and substantive ground of relief. This is especially applicable when the facts upon which such amendment rests were known at the incipiency of the litigation and the character of the relief was such as called for promptness in asserting a right thereto. Cogency is added to these considerations when it is borne in mind that if the facts had been embodied in the bill, so as to have allowed issue to be taken thereon, they might have been fully met and disproved by the defendants."

The courts of Ohio, so far as we have been able to determine, have not passed upon this precise question, but they have passed upon a question somewhat analogous.

In *Lee et al. vs. Thoma*, 1 O. App. 384; affirmed without opinion 91 O. S. 444; 110 N. E. 1062, the court held in the syllabus as follows:

> "An action for specific performance is a bar to a subsequent action for damages alleged to have been sustained through failure of the defendant to carry out the contract which forms the basis of the first suit."

Likewise, in *Zutterling vs. Drake*, 10 O. C. C. (N.S.) 167; affirmed without opinion 82 O. S. 410; 92 N. E. 1113, the court held (Syl. 1):

> "An election between remedies can be made but once, and where a plaintiff has chosen to ask for specific performance he can not subsequently maintain a suit for damages."

In *Mignery vs. Olmstead, Admr.*, 91 O. S. 416, 417; 110 N. E. 1063, the Supreme Court held that (page 417):

> "Plaintiff in error having selected his remedy when he prepared and presented his claim against the estate of James Mignery, deceased, he could not maintain an action upon the instrument in question for the land."

In *Shepherd vs. Payser*, 26 O. Law Abs. 669, the court at page 670 held:

> "Shepherd elected to pursue his legal remedy, reduced said note to judgment, and issued execution thereon. We hold that such conduct evidenced a conclusive act of election, which thereafter precluded Shepherd from resorting to the equitable remedy which he might have chosen had he so elected."

Finally, in *Frederickson vs. Nye et al.*, 110 O. S. 459; 144 N. E. 299, in applying the doctrine of election of remedies, the Supreme Court of Ohio held in the first paragraph of the syllabus as follows:

> "An action by a vendor asking for a money judgment based on fraud in the transfer of property, averring title in the vendee, is an action at law in deceit, and is inconsistent with an action in equity averring equitable title in the vendor and seeking to establish a constructive trust *ex maleficio* in favor of the vendor relying upon the same fraud as set out in the law action."

In the absence of any Ohio decision on the precise question here under consideration, the foregoing authorities dealing with analogous situations are entitled to considerable weight, and from them it may be well argued that the Ohio courts, when the question is presented, would hold that respondent under such facts as we have here would be barred by his election of remedies.

We will not extend the length of this brief by quoting from the other decisions which we have cited on this point, but will only say that they hold that a party, with full knowledge of his rights, who brings an action to recover on a policy of insurance as it is written and loses in that case, may not thereafter maintain a suit in equity to reform the contract and recover upon it as, if and when reformed. He is bound by his election of remedies.

The case of *Northern Assurance Co. vs. Grandview Building Assn.*, 203 U. S. 106; 51 L. Ed. 109, relied upon by respondent and cited in the opinion of the court below, is not in point, nor controlling for several reasons.

First, in the original action brought by *Grandview Building Assn. vs. Northern Assurance Company*, there was a judgment for the plaintiff in the District Court which was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. The Supreme Court reversed (183 U. S. 308; 46 L. Ed. 213). As the federal practice then stood, the plaintiff was entitled to a new trial subject to the law of the case as announced by the Supreme Court. Under the Nebraska law plaintiff was free to begin a new action under the five-year statute of limitations at that time in force (102 N. W. 246, 249; 73 Nebr. 149).

The situation in the case at bar was utterly different—in fact exactly opposite. Here Leithauser has never had a judgment. The decision of the District Court in the first case was against him. That judgment was affirmed by the court below and *certiorari* was denied by this court. In other words, there was a final judgment upon the merits in favor of petitioner and against Leithauser.

The Ohio saving statute **(G. C. Section 11233)** therefore, could not help the respondent or justify the filing of a second suit after the expiration of the period of time permitted by the policy.

A second distinction is that at the time the *Grandview Building Association* case was filed, the law of the State of Nebraska was directly contrary to the law of the State of Ohio on the question as to the validity and binding character of a contractual limitation for bringing suits on policies of fire insurance.

At the time the *Grandview Building Association* case was filed, the law of Nebraska was that such a contractual

limitation was void if it shortened the time permitted by the state statute for the bringing of a suit on a contract.

Miller vs. State Insurance Co., (Nebr.) 74 N. W. 416.

Insurance Co. vs. Drennan, (Nebr.) 77 N. W. 67.

Northern Assurance Co. vs. Grandview Bldg. Assn., (Nebr.) 102 N. W. 246.

In Ohio, as we have seen, the decisions of the Supreme Court uphold as valid and binding the stipulation in the contract of insurance fixing the time within which suits must be brought, even though the period of time so fixed is shorter than the period of limitations fixed by statute for bringing suits on written contracts (*Appel vs. Cooper Insurance Co.*, 76 O. S. 52; 80 N. E. 955).

In Nebraska the contractual limitation in the policy fixing the time for bringing suits was null and void, and the second suit was filed within the five years permitted by the statute of limitations in Nebraska for bringing suits on written contracts. In Ohio the contractual limitation is binding, notwithstanding the statutory limitation.

A final distinction is that at the time the first *Grandview Building Association* case was filed the law of Nebraska and the law of the Eighth Circuit upheld the right of the plaintiff to recover at law in an action upon the contract. *Home Fire Insurance Co. vs. Wood*, (Nebr.) 69 N. W. 941. *Insurance Co. vs. Norwood*, 69 Fed. 71. The law at that time in this court favored recovery. *Insurance Co. vs. Wilkinson*, 13 Wall. 23; 20 L. Ed. 617.

It being settled by the courts that plaintiff, Grandview Building Association, had a remedy at law, the plaintiff could not sue in equity. He had no choice. As this court

said at page 108 of the opinion (203 U. S. 106), referring to the law as it then stood:

> "So long as those decisions stood, the plaintiff had no choice."

In the case at bar, the situation was exactly opposite. At the time respondent filed his petition in the first case and at the time the case was removed to the federal court, the law as established in the Sixth Circuit and by decisions of this court clearly indicated to respondent that he had no remedy at law, but that his remedy, if any, was in equity.

The *Northern Assurance Company* case, therefore, is not in point and it does not support the decision of the court below.

5

The Judgment and Opinion of the District Court Are Sound and Correct and Are in Accord With the Ohio Authorities, and the Decisions of This Court.

The district judge who is an Ohio lawyer and is familiar with the Ohio law, decided this case in favor of the petitioner, and in accordance with the Ohio law. Judge Kloeb found that the petitioner was not entitled to recover for three reasons which he stated in his opinion as follows (R. 87):

> "(1) The petition was not filed within the time fixed by the policy itself for instituting such an action.
>
> "(2) All issues might or could have been adjudicated in the same claim for relief, which was Case No. 3737 at Law, and which was fully tried upon its merits and resulted in a judgment for the defendant.
>
> "(3) Plaintiff is estopped under the principles of former adjudication and election of remedies to maintain this suit."

It is submitted that the judgment of the District Court is sound and correct, and that the judgment of the court below, reversing that judgment, is in conflict upon the questions herein discussed, with the decisions of the Ohio courts and the law as generally established by this and other courts.

It is, therefore, submitted that writ of *certiorari* should be allowed as prayed for, and that the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1941

No. 945

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Petitioner,

vs.

MARTIN LEITHAUSER, AS ADMINISTRATOR OF THE ESTATE OF P. J. LEITHAUSER, DECEASED,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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FOREWORD

An "action" to recover upon the fire policy involved has been prosecuted steadily since March 4, 1931, or for just eleven years. A patient effort has been made to secure justice.

A milestone in that effort was reached on October 7, 1942, when the United States Circuit Court of Appeals decided that the policy could be reformed to express the true agreement of the parties. The opinion of Judge Hicks, reported in 124 F. (2d) 117, appears in the record herein at page 154.

That opinion is masterful. It reflects a combination of rare common sense and profound understanding of law and equity. It is meticulous in its analysis; exhaustive in its treatment of the germane facts and of the cases that are pertinent or controlling; flawless in form and diction.

In commenting upon and replying to the petition for writ of *certiorari* and brief in support thereof, respondent will refer to the headings and page numbers used by petitioner in its brief. Upon many parts, comment would seem unnecessary.

On January 28, 1930, petitioner issued its third of three identical policies in three consecutive years, insuring against loss by fire an elevator building that was located on land leased from a railroad company. In the daily report executed by its agent with each of said policies was a written notice received by the company's home office, stating that the building was on leased land. The premiums were paid and accepted when each of said policies was issued. The daily reports were not physically attached to the policies but upon them were the notations: "Attached to and forming part of Policy No.....," with the appropriate number indicated (R. 28).

The insurance company refused to pay the loss of $10,000 for the reason that the policy contained a printed provision that it was to be void if the building was "on ground not owned by the insured in fee simple."

Judge Hicks expresses the underlying equity in favor of the respondent in the following words (R. 157):

> **"We think that the testimony clearly establishes that it was the mutual intention of the parties to effect a contract of insurance upon the elevator regardless of the provision in the policy which ren-**

dered it void unless Leithauser's interest was that of sole and unconditional ownership in fee simple. Any contrary inference is inconsistent with the commonly accepted principles of fair dealing. When appellee issued the original policy and accepted the premium therefor it knew that the elevator was on ground leased from the B. & O. Railroad Company. When it issued the second and third policies and accepted the premiums it had the same information. There is no ambiguity nor uncertainty in the words, 'Same as before.' ''

I. PETITIONER'S SUMMARY STATEMENT OF THE CASE

(Pp. 1-5)

(1) In the District Court this case was finally submitted and considered as "fully tried upon the pleadings and the evidence" and the court found "the issues in favor of the defendant" (Order, R. 92). Plaintiff's initial request that only the issue of reformation be tried was overridden by the court. In the "Findings of Fact" of the District Court (R. 92) which petitioner says (p. 2) it adopts is the following statement:

> "The issues in the above entitled suit having been duly joined upon the pleadings, consisting of the petition of the plaintiff, the answer of the defendant and the reply of the plaintiff, and the case having been fully heard upon the evidence introduced by both parties **and submitted upon the merits to the Court,**" etc.

In petitioner's first brief, filed in this case in the Court of Appeals, at page 50, it is stated:

> "But we do not have that situation. An answer was filed. The issues were made up and the case tried upon the merits. The court below, therefore,

was entirely relieved from any obligation, in law or comity, to follow the erroneous decision of Judge Jones."

Again, at page 46 of its said brief, petitioner said:

"The law is well settled that the trial court in disposing of this case upon the merits was not bound by the interlocutory views of Judge Jones. The trial court had to take the responsibility for whatever judgment was entered. *Judge Kloeb heard the case on the merits, and rendered a final, appealable judgment in the case.*"

Thus, it will be observed, petitioner's statement on page 2 that "the only issue considered upon its merits was that of reformation" is inaccurate. Petitioner's counsel who prepared the order (R. 92) and the judge who signed it must have understood that the so-called chattel mortgage issue was without merit and was abandoned.

(2) The "other proceedings" to which the order of the Circuit Court of Appeals (R. 183), dated Jan. 12, 1942, refers in its amended opinion are the findings and entries to be made by the District Court after remand when it renders final judgment in favor of plaintiff upon the policy as reformed. The alleged chattel mortgage issue is completely disposed of by Section 9583 of the General Code of Ohio, and by *Insurance Company vs. Leslie*, 47 O. S. 409. That issue is wholly without merit or substance.

Respondent's Statement of Facts

Respondent adopts the findings of facts made by Judge Hicks in his opinion as our statement of facts (R. 154-161). It would be impossible to make a more accurate or a more succinct statement of what the evidence shows.

II. PETITIONER'S STATEMENT OF THE QUESTIONS PRESENTED

(Pp. 6-7)

1. The statement by petitioner that the policy limitation of twelve months is valid and enforceable "under the settled law of Ohio, as announced by its highest court" is misleading, as we will point out later. (*Infra*, p. 11.)

2. The Circuit Court of Appeals did not "ignore and refuse to follow the construction and application" of Section 11233 of the General Code as settled by the Ohio courts. It simply refused to follow petitioner's erroneous construction of the statutes and laws of Ohio.

3. The question of *res adjudicata* was ably disposed of in the Circuit Court of Appeals. It pointed out that the Supreme Court had completely settled that question in *Northern Assurance Co. vs. Grandview Bldg. Ass'n*, 203 U. S. 106.

4. The question of estoppel by election of remedies was also finally settled by this court in said last mentioned case, and the law was established contrary to the contentions of petitioner herein. In said case, the second action, which was to reform the policy, was brought nearly five years after the fire, and it was upheld notwithstanding the contractual limitation of twelve months which was contained in the policy.

III. PETITIONER'S REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

(Pp. 7-11)

1. (Page 8) In citing *Appel vs. Cooper Ins. Co.*, 76 O. S. 52, the defendant still refuses to distinguish that case from the case at bar, and to give force to the rule as stated in the syllabus therein that the time limitation for com-

mencing suit will be enforced *"where no extrinsic facts are alleged excusing delay in bringing the suit." Section 11233 General Code,* was not involved in *Appel vs. Cooper Ins. Co.* and there were no extrinsic facts excusing the delay in bringing that suit.

2. (a) (Page 8) Judge Paul Jones, of the United States District Court of Cleveland, Ohio, held in the case at bar, that the first *Leithauser* case was not determined on its merits and that it was determined "otherwise than on its merits." This position was upheld by the United States Circuit Court of Appeals in the decision against which this petition for writ of *certiorari* is directed. The cases cited by petitioner at the bottom of page 8 are clearly not in point.

2. (b) (Page 9) The petitioner, by an attempted juggling with the meaning of "cause of action" and of "action," here endeavors to show why *Section 11233, G. C.,* does not apply. It will be noted by the language of *Section 11233, G. C.,* that the word *"action"* is used, not *"cause of action."* Under the Ohio General Code, there is but one action and that is known as a "civil action." The action in the case at bar is an action to recover a loss under an insurance policy. The methods used to effect that recovery are called "remedies." Sometimes "cause of action" is used in the sense of "remedy." Where the Circuit Court of Appeals stated in the third from the last paragraph of the opinion that the present suit was not the same "cause of action," it obviously meant that it was not the same remedy. The cases cited, *Larwill vs. Burke, Piscopo, Admr., vs. Railway Co., Price vs. Kobacker Furn. Co., Brown vs. Erie Railroad Co.,* on page 9 of petitioner's brief, do not at all bear out the claims which the petitioner makes. They can each be readily distinguished. In *Larwill vs. Burke,* for example, the parties in the second action were

not the same as in the first action. These and similar cases were fully presented to the Circuit Court of Appeals and they furnish no authority whatsoever for the granting of this petition for writ of *certiorari.*

2. (c) (Page 9) The two cases *Prudential Ins. Co. vs. Howle,* 19 O. C. C. 621, and *Riddlesbarger vs. Hartford Fire Ins. Co.,* 74 U. S. 386, have been cited and presented by the petitioner in all previous hearings. The opinion in the Circuit Court of Appeals takes care of *Prudential Ins. Co. vs. Howle.* So also does the contrary decision of *Cortesi vs. Firemen's Fund Ins. Co.,* 5 O. App. 109, upon the appeal of which the Supreme Court of Ohio refused to grant plaintiff's motion to certify the record. The *Cortesi* case is exactly in point with the case at bar. The *Riddlesbarger* case is taken care of by *Northern Assurance Co. vs. Grandview Building Ass'n,* 203 U. S. 106. We have examined all the old briefs filed in the last named case and find that the *Riddlesbarger* case was strenuously urged therein in support of the insurance company's claim that the statute must give way to a contractual limitation for the commencement of an action. The Supreme Court of the United States definitely refused to follow that doctrine and ignored the *Riddlesbarger* case in its opinion.

3. (Page 9) Here again, the cases cited by the petitioner upon the subject of *res adjudicata* are not responsive to the issues in the case at bar. Judge Hicks, after quoting from *Northern Assurance Co. vs. Grandview Building Ass'n* (*supra*), said:

> "This is enough to say on the question of *res adjudicata.*"

No argument of the respondent herein can better express the fallacies in the arguments which the petitioner makes upon the subject of *res adjudicata* than does the opinion of the United States Circuit Court of Appeals.

4. (Page 10) The opinion of Justice Holmes of this court, in *Northern Assurance Co. vs. Grandview Building Ass'n* (*supra*) also fully answers all of petitioner's contentions with respect to an estoppel by election of remedies.

The *Northern Assurance Company* case is so nearly like the case at bar in its major aspects that it affords a perfect precedent. The case at bar was ably analyzed by the Honorable Paul Jones, District Judge, in his opinion filed October 29, 1936, when he overruled defendant's motion to dismiss this action. We quote from his opinion as follows (R. 33):

> "**An action upon the policy was commenced within the time limited by the terms of the policy. The action was dismissed by the final order of the United States Supreme Court for failure otherwise than upon the merits. This suit was commenced within the statutory time limited for commencing such suits so dismissed by court action. The better weight of authorities supports the view that one who has mistaken his remedy may try again. If the plaintiff can prove that the Defendant Company knew, or its responsible agents understood, that the policy covered property of the plaintiff upon leased ground, the defendant must be held to have issued a policy not in accordance with the agreement and intention of the parties, and reformation would be in order. A mistake which required the clarifying finality of a Supreme Court Order, and not lack of activity upon the part of the plaintiff, has caused delay. A mistake which it is asserted was made in the policy requires the initial consideration of the District Court. I think that the plaintiff, under the facts and the law, is entitled to a determination on the merits of his right to reform the policy to express the true**

contract which the parties understood was executed, or intended to be executed, and, if successful, to enforce his claim in law. This is not to abrogate the voluntary agreement between the parties, but constitutes a patient effort to do justice under law which, it seems to me, affords that opportunity."

IV. PETITIONER'S ARGUMENT

(Page 15)

1. Petitioner's statement that, in Ohio, the law is clearly settled by the case of *Appel vs. Insurance Co.*, 76 O. S. 52, requires qualification. As stated in the second paragraph of the syllabus, quoted on page 16 of petitioner's brief, the policy limitation is upheld only "where no extrinsic facts are alleged excusing delay in bringing the suit." In the case at bar, the delay in bringing the second action was no fault of the plaintiff. Having brought the first action in the state court within twelve months and under the law as laid down in *Foster vs. Insurance Co.*, 101 O. S. 180, plaintiff was compelled to pursue the remedy adopted until it secured the finality of a decision by the Supreme Court of the United States. The case of *Bartley vs. National Business Men's Assn.*, 109 O. S. 583, cited on page 16 of petitioner's brief is not in point. It did not involve Section 11233, G. C., and there were no extrinsic facts alleged excusing delay in bringing suit. Likewise, the case of *Pennsylvania Co. vs. Shearer*, 75 O. S. 249, is not applicable.

The old case of *Riddlesbarger vs. Hartford Fire Ins. Co.*, 74 U. S. (Wall.) 386, is not controlling or even applicable to the case at bar. The case of *Northern Assurance Co. vs. Building Assn.*, 203 U. S. 106, was followed by the Circuit Court of Appeals despite the arguments now presented by the petitioner.

The Riddlesbarger Case and The Northern Assurance Co. Case

The case of *Riddlesbarger vs. Hartford Fire Ins. Co.* was assiduously presented and argued by counsel for the Northern Assurance Co. in their briefs filed in the case reported in 203 U. S. 106. **The same arguments were presented by the Insurance Company's brief as to the controlling effect of the Riddlesbarger case as are now presented by counsel for petitioner, and were in part as follows:**

> "The court nearly forty years ago put this question at rest in the well considered case of *Riddlesbarger vs. Hartford Fire Ins. Co.*, 7 Wall. 386. In that case, Mr. Justice Field, speaking for the unanimous court, used language which has been frequently quoted by the courts of the country, and is now woven into the jurisprudence of America. With reference to a similar clause in a fire insurance policy which had been attacked as against public policy, he said: 'The rights of the parties flow from the contract. That relieves them from the general limitations of the statute.' *Miller vs. Insurance Co.*, 54 Neb. 121. *Ins. Co. vs. Drennan*, 56 Neb. 623. These cases were approved and expressly followed by the Supreme Court of Nebraska and these cases held the contract provision could not take precedence over statute of limitations."

The *Riddlesbarger* case was, in the *Northern Assurance* case, in effect overruled by the Supreme Court, or at least considered inapplicable.

The *Riddlesbarger* case is not applicable or controlling in the case at bar for two reasons:

(1) In that case, the plaintiff had voluntarily dismissed his action and it was sufficient for a decision in that case for the court to hold, as it did hold, that the *voluntary* dismissal was not within the purview of the statute of Missouri which was similar to Section 11233 of the General Code of Ohio. Accordingly, it was unnecessary for the

court to make any declaration that the contractual limitation in the policy took precedence over the statute of limitations.

(2) The statement in the opinion in the *Riddlesbarger* case that the contractual limitation in the policy took precedence over a pre-existing relief statute of Missouri that was similar to Section 11233 of Ohio is contrary to all equity jurisprudence, and particularly to the law as announced by the Supreme Court of Ohio, citing *Leslie vs. Ins. Co.* (*supra*).

Upon the latter proposition, we cannot do better than to quote the language used by counsel for Building Association in their brief at page 73, in the *Northern Assurance Co. vs. Building Ass'n* (203 U. S. 106):

> "On such facts, what is the law? All persons must take notice of the public laws and conform thereto; and if, on entering into a contract, a provision is employed that is repugnant to the public law then in force, it is the unlawful clause in the contract, and not the statute, which must yield. In such case, it is the will of the law-making power of the state, and not that of the individual making a subsequent contract, which is paramount. Otherwise, the state would be without power to promulgate general rules touching any matter which may be the subject of contract. For individuals might subsequently contract contrary to the terms of the public statute, and by invoking the constitutional provisions against impairment of contracts, overthrow the previously enacted statute, in order to uphold the contract. The will of the individual, by such a construction, would thus be made paramount to that of the legislature; and the powers of local government, reserved by the constitution of the states, would be annihilated. This court, however, has not construed the constitutional provision in question to thus cripple the legislative power of the state."

In the *Riddlesbarger* case, the plaintiff did not bring his facts within the Missouri statute which provided for the extension of one year within which to bring another suit *provided the plaintiff* "suffered a non-suit in the first action." Upon this point, we quote from the brief of Hartford Fire Ins. Co., which it filed in that suit (Brief, p. 29):

> "The plaintiff in that suit (referring to the first action) went out of court under no order or judgment, nor by reason of any defect in form or remedy. The defendant answered to the merits and the plaintiff *voluntarily* and without cause dismissed his suit."

This position of the defendant was upheld by the Supreme Court, and the decision on this point was sufficient in itself to resolve the suit in favor of the insurance company. The balance of the decision in regard to declaration that the contractual limitation overrode the statutory provision may well be regarded as *obiter dictum.*

In the *Northern Assurance Company* case, the Supreme Court, while obviously refusing to follow the doctrine of the *Riddlesbarger* case, which was decided way back in 1869, adopted a course that would avoid an express repudiation of the earlier case by simply saying in the opinion:

> "A question argued as to the obligation of the contract having been impaired by a statute as construed, was not taken below and is not open here."

The fact remains that the question whether the contractual limitation in the policy barred the new action was distinctly taken below (in the Supreme Court of Nebraska), and also in the Supreme Court of the United States. The silence of the Supreme Court on this point constituted as effective a repudiation of the Riddlesbarger doctrine as if the court had delivered an express reversal. **Regardless of**

the constitutionality or unconstitutionality of the Nebraska statute, the Supreme Court was confronted with the bar of the contractual limitation in the policy, and it refused to give any force or effect to that contractural limitation although, as before stated, the point was most vigorously presented to the court by the plaintiff in error.

The Nebraska policy contained exactly the same provision as to limitation of action as that involved in the case at bar. The Supreme Court of Nebraska, in its opinion in the *Northern Assurance Co.* case (102 N. W. 249), spoke as follows:

> "The defendant contends that this action is barred by a limitation written in the policy and by the statute."

Petitioner's claim that the application of Section 11233 of the General Code of Ohio is in conflict with the Ohio decisions (p. 17) is wholly unfounded:

(a) The first or prior action in the case at bar failed otherwise than upon the merits. It is clearly established by the law in the case of *Northern Assurance vs. Grand View Building Assn.* that the decision in the prior action was not *res adjudicata* and was not a decision on the merits.

Original Action Failed Otherwise Than Upon Its Merits

After following Justice Holmes' opinion that the first decision was not *res adjudicata* and that in the former action plaintiff failed otherwise than upon the merits, the way is open for the application of Section 11233 of the General Code of Ohio. If the former decision was not *res adjudicata*, then manifestly there was no final adjudication upon the merits; conversely, if the former action had failed upon its merits, there would have been a final adjudication.

As Justice Holmes said, the former decision simply decided "that the contract could not be recovered upon as it stood or be helped out by any doctrine of the common law"; and again, that "the former decision, of course, is not an adjudication that the contract cannot be reformed."

The claim, the right to recover upon the policy, was not decided upon its merits. According to the law, as then announced by the Supreme Court and before the decision of *Erie Railroad Co. vs. Tompkins*, plaintiff was not permitted, in the action as brought, to bring into the case all the facts, and particularly the controlling fact that the defendant had received formal typewritten notices for three successive years that the elevator was located on leased land. In truth, the record shows that the original case was decided against the plaintiff because of his inability to make proof of these formal notices, and for no other reason. Because of a technical rule of law or procedure, the parol evidence rule; because of a rule which barred the application of the doctrine of equitable estoppel, the plaintiff was deprived of the benefit of a controlling fact, to-wit, the controlling fact that the insurance company had formal notice upon its own printed forms of the fact that the elevator was located upon land not owned by the assured in fee simple, and therefore, knew that it was issuing a policy of insurance to cover an elevator located upon leased land.

How, in justice, can it be said that a claim has been decided upon its merits when a controlling fact is barred out because of a procedural technicality?

Plaintiff's broad claim was the right to recover upon a contract of insurance. Technically, the policy itself was not in such form as to permit a recovery at law. It omitted to express a controlling fact or term or condition and for that reason it did not completely and fully express the intention of the contracting parties. The Supreme Court

finally held that, without the admission of that controlling fact in evidence, the defendant was free from liability.

That also was exactly the holding in the case of *Northern Assurance Co. vs. Building Association,* 203 U. S. 106. Plaintiff in that case was permitted to try again because it had misconceived its remedy; because, like the plaintiff in the case at bar, it had therefore been deprived of a trial on the merits; because it had been unable to bring into operation a fact, a controlling fact, which, if done, would have produced an opposite decision of the case. The controlling fact in that case which was barred out in the action at law was that the duly authorized agent knew that there was concurrent insurance.

As stated in Ruling Case Law, Vol. 23, p. 348, par. 44:

> **"By the better rule, equity will give the party relief by reformation, even after the action at law on the instrument in question has been defeated and the relief will be complete; that is on satisfactory proof, the instrument will be reformed and damages adjudged. The judgment at law is res adjudicata as to only such facts as are in issue in the suit at law, and the suit at law by its very nature is almost never competent to investigate the merits of the plaintiff's claim and is therefore not conclusive on him in his suit in chancery."**

In citing the case of *Siegfried vs. R. R. Co.,* 50 O. S. 294, at page 19, petitioner fails to distinguish between the use of the word "action" and the use of the term "cause of action." It will be noted in the quotation on page 19 that the Supreme Court of Ohio used the word "action" and not the term "cause of action." **The statute, Sec. 11233 G. C., uses the word "action," not the term "cause of action," when it declares that the plaintiff "may commence a new action within one year after such date," etc.**

The word "action" is likewise used in *Frost vs. Blatz*, 23 O. A. 40, cited by petitioner on page 19.

In the case at bar, the new action is the same as the first action; it is an action to recover upon the insurance policy. As stated by Justice Holmes in *Grand View Building Co.* case: "The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies." The respondent herein sought to recover in both actions upon a policy or contract of insurance which insured an elevator building that was located on leased land.

Fallacy of Petitioner's Claim That Section 11233 Does Not Apply Where the First Action at Law is Changed to Include, in a Second Action, a Prayer for Equitable Relief (p. 20).

Petitioner claims that Section 11233, G. C., applies only if the same remedy or same "cause of action," used in its narrow sense, is pursued in the second action. That, of course, is not true. The second action might be *res adjudicata* if exactly the same remedy or the same "cause of action" were again pursued. It is because a different remedy is needed, it is because the first action failed otherwise than upon its merits, that Section 11233, G. C., gives relief. Otherwise, that statute would afford no relief whatever in cases which were decided against plaintiff on account of his mistake in choice of remedy.

In *Ruling Case Law*, Vol. 15, p. 855, par. 431, the law is well settled as follows:

> "It is not the mere recovery in a prior action that constitutes a bar or estoppel, but the decision upon the merits of the question in dispute between the parties and in order to be conclusive as an estoppel, or a bar under the doctrine of *res adjudicata*, the general rule is that a judgment must have been rendered on the merits of the case. If the real merits

of the suit are not determined in the prior decision the judgment will not be a bar. Considerable confusion has, however, arisen from the indefinite use of the expression 'upon the merits.' A judgment against the plaintiff on the merits, in the broadest sense of the expression, determines that he has no cause of action against the defendant. In a more restricted sense, the words are sometimes used to indicate that he cannot recover in the particular form of action. In the first instance he is permanently out of court, while in the second, he may restate his case so as to include the cause of action that he has. But he cannot claim a right in that action to have the precise question theretofore decided against him again determined by the court, unless a re-examination has been regularly ordered."

The Alleged "Dilemma."

(b) (Page 21) We are unable to see how the court below impaled itself upon any horns of a dilemma, as stated by the petitioner. The cause of action in the second suit, in a narrow sense or in the old common law use of the expression, was not precisely the same cause of action as in the first suit; that is to say, it was not the same remedy. In Ohio, we have but one action which is called a "civil action." The word "action," as used in Section 11233, G. C., necessarily refers to a "civil action."

In the case of *Hart vs. Andrews*, 103 O. S. 218, the Supreme Court of Ohio discussed the purpose and policy of the legislature of Ohio in simplifying our procedure and in getting away from technical forms of action. We quote from the opinion at page 227 as follows:

> "The plain purpose of the general assembly by this provision was to abolish all these antiquated, technical forms of action, and the strict construction with which courts had adjudicated concerning them, and to substitute therefor, first, the facts, setting forth 'an injury' in ordinary and concise language, and, second, 'the relief' demanded.

> "The game of strategic, technical, shuttlecock pleading, to defeat substantial rights based on principles, was to be forever banished from our Ohio jurisprudence.
>
> "Unfortunately, many of the old courts called upon to construe the new code were out of sympathy with it and did their best to bleed it to death; but the plain provisions of the statute, notwithstanding these adverse decisions, must nevertheless control."

Section 11239 of the General Code of Ohio provides as follows:

> "**There shall be but one form of action, to be known as a civil action.** This requirement does not affect any substantive right or liability, legal or equitable."

The first action failed otherwise than upon its merits and Section 11233, G. C., was intended to give relief and does give relief on account of such failure. The cases of *Larwill vs. Burke, Piscopo, Admr., vs. Railway Co., Brown vs. Erie Railroad Co.* all use the word "action," not "cause of action." As before stated, petitioner fails to distinguish between the use of the term "cause of action" in its narrower sense, or in its meaning as a remedy, and the term "cause of action" in its broad sense, where it is sometimes used to mean "action."

In *Brown vs. Erie Railroad Co.*, 176 Fed. 545 (pp. 22-23), as in our case, the parties and the injury were the same, and the facts pleaded were the same in the second action as in the first action. As stated by Justice Holmes in *Northern Assurance Co. vs. Building Assoc.*, 203 U. S. 106:

> "The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies."

There is Nothing in Sec. 11233 G. C. to Warrant the Assertion That It Applies Only to Statutory Limitations and Not to Contractual Limitations. (P. 24.)

Judge Hicks disposes of the contentions of petitioner with respect to the case of *Prudential Insurance Co. vs. Howle* (Rec. 158, 159, 160), decided in 1899. That case has never been reviewed in any manner by the Supreme Court of Ohio and it has never been judicially recognized by any court in Ohio since its decision except by the Honorable District Judge who tried the case at bar. A superficial reading will reveal that the statement to the effect that Section 11233 did not apply to contractual limitations was purely *obiter dictum.* The case of *Cortesi vs. Ins. Co.,* 250 C. C. (N.S.) 509, was decided in 1916. The majority opinion ignored the *Prudential Ins. Co. vs. Howle* case and even the dissenting judge did not consider it applicable or worthy of mentioning. The dissenting opinion rested chiefly upon the *Riddlesbarger vs. Hartford Fire Ins. Co.* case. We have already shown why that case is inapplicable to the case at bar as well as contrary to Ohio jurisprudence.

Even if the respondent did not have the benefit of Section 11233 of the General Code, equity would nevertheless give relief in such a case as we have under consideration. The plaintiff brought his action originally at law, under the well-known principle that equity will not furnish relief where an adequate remedy exists at law. He based his petition upon the leading Ohio case of *Foster vs. Ins. Co.* (*supra*) and the case of *Hanover Fire Ins. Co. vs. Dallavo,* 274 Fed. 258 (6th Circuit, Ohio), which had never been reversed and which were substantially similar cases. Those cases permitted the application of the doctrine of estoppel. However, at that time, general federal jurisprudence was to the contrary, and after the removal of the case from the state court to the District Court, federal jurisprudence con-

trolled. Under it, plaintiff had chosen the wrong remedy; whereas under the state law, and the law of the circuit in which Ohio was situated, he had chosen the correct remedy. Later, in 1938, it was adjudicated by the Supreme Court of the United States in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, that the federal courts should apply the statutes and laws of the state and not the general federal law. If *Erie Railroad Co. vs. Tompkins* had been decided earlier and the District Court had applied the law of *Foster vs. Ins. Co.* (*supra*), plaintiff would, of course, have won his case in the first action at law.

Under these circumstances, why should not chancery come to the relief of plaintiff who has been diligent throughout these many years in the prosecution of his suit and who has been denied final justice only because the law of *Erie Railroad Co. vs. Tompkins* was not sooner announced? Under these circumstances, also, equity can and should sweep aside any contractual or statutory limitation in order to grant adequate relief and render complete justice. It would be an intolerable condition if, under our law, a man could not secure his rights who did everything he was required to do under the law as announced in similar cases at the time of his taking action.

Controlling Case of Insurance Co. vs. Leslie.

The leading case of *Insurance Company vs. Leslie*, 47 O. S. 409, contains in its opinion a complete answer to both defenses that were set up in defendant's answer herein. The Supreme Court of Ohio in this case construed Section 3643, R. S. (now Section 9583 of the General Code of Ohio), and declared the law of this state on page 416 in the following language:

> "The statute rests upon considerations of public policy; one of its purposes being, to exact of insurance companies doing business in this state,

reasonable diligence and care to avoid improper risks, and over-insurance, by requiring their agents to make personal examination of the property, and fix its insurable value, before writing the insurance. Well regulated companies, after such examination, would not take the risk if not a proper one, nor write a policy for an amount greater than the actual value of the property. The more effectually to accomplish this purpose, the statute has provided, that the company shall be liable on its policy, unless a change subsequently occurs increasing the risk, without its consent, or the assured has been guilty of intentional fraud; and, that in case of total loss, the company shall abide by the valuation it has placed upon the property. Under the rule of liability thus established by the statute, responsible companies are less likely to take risks recklessly, or for a sum greater than the value of the property; **and persons whose buildings are insured, receive protection against the injustice resulting from merely technical defenses, founded upon the many conditions inserted in the policy, formerly resorted to. The statute cannot, we think, be treated as conferring upon the assured a mere personal privilege which may be waived or qualified by agreement. It has a broader scope. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability. Terms and conditions embraced in the policy inconsistent with the provisions of the statute, are subordinate to it, and must give way.** Of this character are the stipulations that the loss or damage shall be estimated according to the true value of the property at the time of the fire, and that no suit shall be maintained until the amount shall be fixed by an award. These being in conflict with the statute, and therefore inoperative, the averments of the answer with respect to them were ineffectual as a defense, and evidence in support of them, was inadmissible. **And the statements in the application, of the value of the property, and its condition, in regard to which the company should have been informed by the examination the statute required it to make, were immaterial, upon which the insurer had no right to rely, and could not be fraudulent.''**

Cases in Ohio which cited and followed the law as laid down in *Insurance Co. vs. Leslie* (*supra*) include the following:

United Firemen's Ins. vs. Kukral, 7 O. C. C. 356 (Aff'd by Supreme Court in 51 O. S. 609).

People's Mutual Fire Ins. Co. vs. Bowersox, 5 C. C. 449.

Webster vs. Dwelling House Ins. Co., 35 W. L. B. 15.

Insurance Co. vs. Hull, 51 O. S. 278.

Insurance Co. vs. Drackett, 63 O. S. 54.

Cincinnati vs. Pub. Utilities Comm'n, 98 O. S. 326.

Moody vs. Ins. Co., 32 W. L. B. 405.

Sun Mutual Ins. Co. vs. Hock, 8 C. C. 344.

Dwelling House Ins. Co. vs. Webster.

Insurance Co. vs. Luce, 11 C. C. 480.

Quoting from the opinion in *United Firemen's Ins. Co. vs. Kukral* (*supra*):

> "This very case has been before us before this proceeding in error upon this question, and we then decided, as we do now, that there may have been a mortgage upon the insured premises, and in that sense the ownership may not have been entire, unconditional and sole; **and yet the plaintiff may be entitled to recover under Section 3643 (now Sec. 9583 G. C.) which has made an entire change in policies of fire insurance and in the law to be administered in such suits.**"

Section 9583, General Code of Ohio (formerly Sec. 3643 R. S.) provides as follows:

> "A person, company or association insuring any building or structure against loss or damage by fire or lightning, by renewal of a policy, shall cause such building or structure to be examined by his or its

agent, and a full description thereof to be made, and its insurable value fixed, by him. In the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurer received a premium, shall be paid."

The foregoing statute together with the interpretation given to it by the Supreme Court of Ohio and the inferior courts, in the cases above cited, furnishes a complete reply to the defenses made by the petitioner. We have only to cite to this Honorable Court the well-known and controlling case of *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64, in order to establish the unassailable right of the respondent to recover upon the renewal insurance policy issued by the petitioner. The judgment of the United States Circuit Court of Appeals was altogether just and righteous. The petition for writ of *certiorari* herein should be denied.

VIII. CONCLUSION

In conclusion, there appears to be no good reason why this case should be admitted to the Supreme Court. The opinion of the Circuit Court of Appeals is sound and in accordance with the established law of Ohio. The policy of Ohio law, as declared in *Insurance Company vs. Leslie,* to subordinate the contract of insurance to the statutes in force at the time the policy was issued requires that Sections 11233 and 9583, General Code, be given full force and effect. Under the law as announced in *Erie Railroad Co. vs. Tompkins,* the Circuit Court of Appeals was authorized to apply, and it did apply, that policy and the Ohio decisions and statutes to the issues in the case at bar. It also effectively applied the rules laid down in the leading and

very similar case of *Northern Assurance Co. vs. Building Ass'n.*

Finally, we maintain that the decision of the Circuit Court of Appeals restores the insurance business to the plane of fair dealing from which it was tottering. It will be welcomed by most insurance companies and will be of incalculable benefit to both insurers and insured. It will strengthen confidence in insurance everywhere.

Fair dealing is a prime essential of our American system. In insurance it is basic. Public confidence in the integrity and fair dealing of insurance companies is indispensable. That confidence would be utterly destroyed if our courts should look with favor upon and give vitality to such defenses as were made in the case at bar. The law abhors forfeitures.

Respectfully submitted,

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